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ALEXANDER L. STEVAS
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No. 83-1406

In the
Supreme Court of the United States
October Term, 1983

WHIRLPOOL CORPORATION,
Petitioner,

v.

WILFRED H. VANCE,
Respondent.

RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

The court of appeals' decision upon which Vance's cross-petition is based was rendered by the Fourth Circuit on May 10, 1983 (Vance App. A, at A1-14).[1]

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[1] The procedural history of this case at the district court level is set forth in the Fourth Circuit's original opinion. *See Vance* v. *Whirlpool Corporation*, 707 F.2d 483, 485-86 (4th Cir. 1983). Put rather simply, Whirlpool presented pretrial motions that Vance had not complied with a 60-day conciliation period and 180-day filing period under § 7(d) of the Age Discrimination in Employment Act (hereinafter cited as "ADEA"). *See* n. 2, *infra*. After a trial to a jury, which entered a verdict in Vance's favor, Whirlpool appealed on those grounds, among others.

In that opinion, the court of appeals held that the 60-day conciliation period of Section 7(d)[2] was a jurisdictional prerequisite, and therefore not subject to equitable modification (*Id.* at A5-A12). The court therefore vacated the district court's judgment in favor of Vance and remanded the case with instructions to dismiss the complaint (*Id.* at A12-13). The court, however, granted Vance leave to refile following proper conciliation, and held that the statute of limitations could be equitably modified in order to accommodate such a procedure (*Id.* at A13-A14). Since the court concluded that the 60-day conciliation period precluded jurisdiction in the district court, it specifically declined to reach the issue of the jurisdictional dimensions of the 180-day requirement or the circumstances under which it might be tolled (*Id.* at A14 n.7).

Following the Fourth Circuit's original decision, Vance filed a Petition For Rehearing, requesting the court to reconsider its holding that the 60-day conciliation period of Section 7(d) is jurisdictional and suggesting that the court consider and resolve the issues regarding the 180-day requirement of the statute. Following Vance's Petition For Rehearing, the Fourth Circuit supplemented its original opinion on August 29, 1983

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[2] Section 7(d) of the ADEA provides as follows in relevant part:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed —
>
> (1) within 180 days after the alleged unlawful practice occurred . . .

29 U.S.C. § 626(d) (1980).

and disposed of the issue whether Vance had complied with the 180-day requirement of the ADEA (Vance App. B, at A15-A20). The court determined that the 180-day requirement of Section 7(d)(1) was not jurisdictional, but rather could be equitably tolled where circumstances warranted (*Id.* at A16-A19). The court then proceeded to find that the district court was correct in holding that the 180-day period should be tolled because of Whirlpool's failure to post statutory notice (*Id.* at A19-A20).

Following the Fourth Circuit's supplemental decision, Whirlpool filed a Petition for Rehearing suggesting, among other things, that the court reconsider its finding that the 180-day waiting period had been equitably tolled in this case. The Fourth Circuit denied Whirlpool's Petition for Rehearing in an order entered on October 27, 1983 (Vance App. C, at A24).

Whirlpool then filed a petition for certiorari, Case No. 83-1223, with this Court on January 24, 1984. In its petition, Whirlpool requested that the court review the Fourth Circuit's original decision, which granted plaintiff leave to refile and equitably modified the statute of limitations, and the court's supplemental opinion, in which the court found that the 180-day waiting period had been equitably tolled. In addition to filing a response to Whirlpool's petition for certiorari, Vance filed a cross-petition, Case No. 83-1406, apparently on February 22, 1984 (*See* App. A, *infra*, at A1). In his cross-petition, Vance requested the court to review the Fourth Circuit's original decision that the 60-day conciliation period of Section 7(d) of the ADEA is a jurisdictional prerequisite to a cause of action brought under the statute.

This court denied Whirlpool's petition for certiorari in Case No. 83-1223 on March 19, 1984 (*See* App. B, *infra*, at A2). On April 11, 1984, the Clerk of this Court, at this Court's direction, then requested Whirlpool to file the instant response to Vance's cross-petition (*See* App. A, *infra*, at A1).

ARGUMENT

THE COURT SHOULD NOT GRANT VANCE'S CROSS-PETITION FOR A WRIT OF CERTIORARI

As its Response, the Company presents two alternative grounds on which this Court should deny Vance's cross-petition for a writ of certiorari. First, as a procedural matter, Supreme Court Rule 20.5 bars the Court from granting Vance's cross-petition, since the cross-petition was untimely filed (except for the provision of Supreme Court Rule 19.5) and the Court has previously denied Whirlpool's timely petition for a writ of certiorari. Alternatively, even if the Court should decide as a procedural matter not to follow its own Rule, the Company contends that the Fourth Circuit's decision, upon which the cross-petition is based, that the 60-day conciliation period of Section 7(d) is a jurisdictional prerequisite to the maintenance of an action under the ADEA, is in accord with the decisions of this court as well as the decisions of every other court of appeals considering that same question. Issuance of a writ of certiorari is therefore not justified, on a substantive basis, under Supreme Court Rule 17.

I. SUPREME COURT RULE 20.5 PROHIBITS THE COURT FROM GRANTING VANCE'S CROSS-PETITION, SINCE THE CROSS-PETITION WAS UNTIMELY FILED AND THE COURT HAS PREVIOUSLY DENIED WHIRLPOOL'S TIMELY PETITION FOR A WRIT OF CERTIORARI

Supreme Court Rule 20.5 provides as follows:

> A cross-petition for writ of certiorari shall be deemed in time when it is filed as provided in para-

> graphs .1, .2, and .4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

Thus, a cross-petition for certiorari may be considered timely under Supreme Court Rule 20.5 if it is filed (1) within the time limits imposed by Supreme Court Rule 20, or (2) pursuant to Supreme Court Rule 19.5.

To determine whether a cross-petition has been timely filed under Supreme Court Rule 20 in a non-criminal case, Supreme Court Rule 20.2 sets the length of the filing period as follows: "A petition . . . shall be deemed in time when it is filed with the Clerk within the time prescribed by law. *See* 28 U.S.C. ¶ 2101(c)." Section 2101(c) requires that the petition in such a case be filed with the Clerk of the Supreme Court within ninety days after the entry of the judgment or decree by the lower court. Supreme Court Rule 20.4 further makes clear that the filing period, in a case where a party has filed a timely petition for rehearing, runs for all parties from the date of the denial of rehearing or the entry of a subsequent judgment entered on the rehearing.

As provided for in Supreme Court Rule 20.5, a cross-petition which is not otherwise not timely filed under Supreme Court Rule 20 may be timely filed in accord with Supreme Court Rule 19.5. Supreme Court Rule 19.5 provides in relevant part:

> Not more than 30 days after receipt of the petition for certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28,

> 40 copies of a cross-petition for certiorari, which shall comply in all respects with Rule 21. The cross-petition will then be placed on the docket subject, however, to the provisions of Rule 20.5.

As provided for in Supreme Court Rule 20.5, however, no cross-petition which would be untimely but for Supreme Court Rule 19.5 "shall be granted unless a timely petition for writ of certiorari of another party to the case is granted." *See also* Supreme Court Rule 12.4 (providing that "[t]he issues tendered by a timely cross-appeal docketed under this provision may be considered by the court only in connection with a separate and duly perfected appeal over which this Court has jurisdiction without regard to this paragraph").

To the extent that there may be any confusion whatsoever about the restrictions of Supreme Court Rule 20.5, as it interlocks with other provisions of Supreme Court Rules 20 and 19.5, the following commentary from Moore, Bendix & Ringle, 13 MOORE'S FEDERAL PRACTICE ¶ 820.05 (Matthew Bender, 1982) is instructive:

> Any cross-petition which would not be timely under R 20.1, 20.2, and 20.4 may be properly filed only by complying with R 19.5. Rule 20.5, in rather confusing language, provides that a cross-petition filed pursuant to R 19.5 (and which would thus not have been timely under A 20.1, 20.2, and 20.4) will not be granted unless a timely petition for certiorari of another party to the case is granted . . . Thus, where a cross-petitioner for certiorari wants his petition granted regardless of whether the Court grants his opponent's petition, he should file the cross-petition in compliance with R 20.1, 20.2, and 20.4. Where he desires review only if his opponent's petition for certiorari is granted, he may proceed under R 19.5.

Id. at SC 20-12. *See also* B. Bosky & E. Greesman, *The Supreme Court's New Rules For The Eighties*, 85 F.R.D. 487, 504 (1982); E. Greesman, *Supreme Court Practices: Circa 1980*, 66 A.B.A. J. 1385, 1389 (1980).

Applying Supreme Court Rule 20.5 to the instant cross-petition, it is first clear that the cross-petition was not filed within the limits imposed by Supreme Court Rule 20.1, 20.2 and 20.4. In this case, a timely petition for rehearing was filed with the Fourth Circuit and was denied on October 27, 1983 (*see* Vance App. C, at A24). Because this was a non-criminal case, Vance thus had ninety days from October 27, 1983 in which to file an independently timely cross-petition. The ninety-day period expired on January 25, 1984, with no cross-petition then on file.

Because Whirlpool filed their petition for certiorari on January 24, 1984, and Vance filed a cross-petition on February 22, 1984, Vance's cross-petition may be deemed timely filed within the requirements of Supreme Court Rule 19.5. Because this was the only filing period that the cross-petition complied with, however, the cross-petition could only be granted under Supreme Court Rule 20.5 if Whirlpool's petition for certiorari were also granted. Whirlpool's petition for certiorari in Case No. 83-1223 was denied on March 19, 1984 (*see* App. B, *infra*, at A2). As a result, Supreme Court Rule 20.5 prohibits the Court from granting Vance's cross-petition.[4]

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[4] Interestingly, Vance argued in his Response to Whirlpool's petition for certiorari in Case No. 83-1223 that this Court should grant both his cross-petition and Whirlpool's petition for certiorari. Clearly, Vance recognized that his cross-petition could be granted under Supreme Court Rule 20.5 only if Whirlpool's petition were also granted.

II. THE FOURTH CIRCUIT'S DECISION THAT THE 60-DAY CONCILIATION PERIOD OF SECTION 7(D) IS A JURISDICTIONAL PREREQUISITE TO THE MAINTENANCE OF AN ACTION UNDER THE ADEA DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS CONSIDERING THE SAME QUESTION.

In his cross-petition, Vance urges that the Fourth Circuit's ruling on the jurisdictional nature of the 60-day notice period of Section 7(d) is in conflict with the decisions of this Court and other federal courts, both at the district court and appellate court levels. In fact, noticeably absent from Vance's cross-petition is any federal court case which conflicts with the Fourth Circuit's precise ruling in this case; *i.e.*, whether the 60-day conciliation period of Section 7(d) of the ADEA is jurisdictional. On the contrary, the courts of appeals which have considered this same question have consistently determined that the 60-day conciliation period of Section 7(d) of the ADEA is jurisdictional. *See, e.g., Wright* v. *State of Tennessee*, 628 F.2d 949, 953 (6th Cir. 1980) (en banc); *Ewald* v. *Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d 1183, 1187-88 (6th Cir. 1980), *vacated and remanded on other grounds*, 449 U.S. 914 (1980); *Reich* v. *Dow Badische Co.*, 575 F.2d 363, 367-68 (2d Cir. 1978); *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1077 (7th Cir. 1976), *rev'd and remanded on other grounds*, 441 U.S. 677 (1979). In light of these uniformly consistent holdings on this same issue, and the absolute absence of any directly conflicting authority, a grant of review on writ of certiorari is unwarranted.

Perhaps due to the uniform case law supporting the Fourth Circuit's decision on the issue and the total

absence of authority directly to the contrary, Vance attempts to create such conflict by building analogies to case law on other issues. These "conflicts" created by Vance include: (1) an alleged conflict with this Court's opinion in *Zipes* v. *Transworld Airlines, Inc.*, 455 U.S. 383 (1982); (2) an alleged conflict with this Court's opinion in *Oscar Mayer* v. *Evans*, 441 U.S. 750 (1979); and (3) an alleged conflict with several court of appeals' decisions finding that the conciliation requirement in Section 7(b) of the ADEA is not jurisdictional. In addition to constituting little more than a "rehash" of his argument before the Fourth Circuit, these "conflicts" created by Vance suffer a number of fundamental inconsistencies, as pointed out by the Fourth Circuit in its original opinion and briefly summarized below.

First, the Fourth Circuit's initial opinion is not in conflict with this Court's opinion in *Zipes* v. *Transworld Airlines, Inc.* On the contrary, *Zipes* simply holds that the statutory 180-day filing period of Section 706(e) of Title VII[4] is not a jurisdictional prerequisite to the filing of a lawsuit in the district court. In addition to the different statutes involved, the 180-day filing period of Section 706(e) of Title VII and the 60-day conciliation period of the ADEA serve, as the Fourth Circuit itself pointed out, separate and distinct purposes: the 180-day charge

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[4] Section 706(e) of Title VII provides in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter . . .

42 U.S.C. § 2000e-5(e) (1976).

requirement is more in nature of a statute of limitations designed to preclude the maintenance of stale claims, while the 60-day conciliation period is an absolute waiting period of abstention by the federal judiciary designed to enhance judicial economy by promoting the exhaustion of administrative remedies through the Department of Labor prior to the institution of a private suit (*see* Vance App. A, at A8).

Secondly, the Fourth Circuit's opinion regarding the jurisdictional nature of the ADEA's 60-day conciliation period does not conflict with this Court's opinion in *Oscar Mayer*. In *Oscar Mayer*, this Court held that an employee's failure to comply with Section 14(b) of the ADEA,[6] providing that aggrieved employees may not file a cause of action until 60 days after proceedings have been commenced pursuant to state law when the alleged discriminatory action has occurred in a state prohibiting age discrimination, did not deprive the district court of jurisdiction. The *Oscar Mayer* decision, however, as the Fourth Circuit appropriately noted, said nothing to diminish the importance of conciliation to the federal scheme as required in Section 7(d) of the Act (*see* Vance App. A, at A9-A10).

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[6] Section 14(b) of the ADEA provides in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . .

29 U.S.C. § 633(b) (1969).

Finally, the Fourth Circuit's opinion is not in conflict with the several courts of appeals' decision finding that the conciliation requirement of Section 7(b) of the ADEA* is not jurisdictional. *See Marshall* v. *Sun Oil Co.*, 605 F.2d 1331, 1337, n.8 (5th Cir. 1979); *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974). As described more fully by the Fourth Circuit in its opinion in this case, Section 7(b) differs in form, substance and purpose from the provisions of Section 7(d) at issue in this case (Vance App. A, at A10-A12). The opportunity for extra-judicial conciliation and settlement is within the power of the plaintiff while the actual exercise of that opportunity by the Agency is not within the plaintiff's power. The decisions referred to by Vance are therefore clearly inapposite.

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*Section 7(b) of the ADEA provides in pertinent part:

> Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this [Act] through informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(b) (1980).

CONCLUSION

For the foregoing reasons, the Court should deny Vance's cross-petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 11, 1984

Charles J. Griffin, Jr., Esquire
Suite 1500
100 West Monroe Street
Chicago, IL 60603

Re: Wilfred H. Vance v. Whirlpool Corporation,
No. 83-1406

Dear Mr. Griffin:

A petition for a writ of certiorari was filed in this Court on February 22, 1984 in the above-entitled case, to review an order of the United States Court of Appeals for the Fourth Circuit (No. 81-1568), dated May 10, 1983. Our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that a response be filed in this case. Forty printed copies of the response, together with proof of service thereof, should reach this office on or before May 11, 1984.

Your attention is directed to Rule 33 of the Rules of this Court. Please note that the color of the cover of your brief should be light orange.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

/s/ Alexander L. Stevas
Alexander L. Stevas
Clerk

vm
Encl.
cc: Samuel M. Millette, Esq.

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

March 19, 1984

Charles J. Griffin, Jr., Esquire
Suite 1500
100 West Monroe Street
Chicago, IL 60603

Re: Whirlpool Corporation v. Wilfred H. Vance,
No. 83-1223

Dear Mr. Griffin:

The Court today entered the following order in the above-entitled case:

"The petition for a writ of certiorari is denied."

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By /s/ Francis J. Lorson

Francis J. Lorson
Chief Deputy Clerk

vm

cc: Samuel M. Millette, Esq.